

No. 42707-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JEFFREY S. MOORE and MARIO GADEA-RIVAS,

Appellants.

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Brief of Appellant Jeffrey S. Moore

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## ASSIGNMENTS OF ERROR

### **Assignment of Error #1**

The court erred in ruling that the trial court's failure to set trial dates within speedy trial was appropriate under CrRLJ 3.3(a)(4) because it was "delayed by circumstances not addressed in this rule." (CP 145)

#### **Issue**

Whether the trial court's failure to set a trial date within speedy trial was cured under CrRLJ 3.3(a)(4).

### **Assignment of Error #2**

The court erred in ruling that the Defendant failed to appear for court hearings continuing the motion hearing when the Defendant had waived his presence in writing and was never sent notice to appear at any of these hearings. (CP 145)

#### **Issue #1**

Whether the trial court erred in ruling that the Defendant failed to appear when the Defendant had waived his presence in writing and he was never notified or sent notice to appear for the hearing.

#### **Issue #2**

Whether requiring a Defendant's presence for a court hearing without providing notice of that court hearing violates the Defendant's Due Process Rights.

### **Assignment of Error #3**

The court erred in ruling that the Defendant's attorney had an ethical duty to notify their clients of court hearings under the Washington Rules of Professional Conduct. (CP 146)

#### **Issue #1**

Whether the Defendant's attorneys had an ethical obligation to notify their clients of court hearings under the Washington Rules of Professional Conduct when the court hearing was called, by email of the court clerk, less than 48-hours before the hearing.

#### **Issue #2**

Whether the Court and the prosecution must exercise due diligence in providing notice so that the Defendant has the opportunity to be present in court.

## **STATEMENT OF THE CASE**

The Court arraigned Mr. Moore, who was out of custody, on May 11, 2009, invoking a 90-day speedy trial expiration. (CP 8). On July 2, 2009, Mr. Moore waived speedy trial through December 1, 2009. (CP 8). On November 18, 2009, he waived speedy trial through February 18, 2010. (CP 9). On January 13, 2010, he waived speedy trial through June 1, 2010. (CP 9). On May 24, 2010, he waived speedy trial through September 1, 2010. (CP 10). On May 14, 2010, Counsel for Mr. Moore filed a Notice of Motion and Motion to Suppress Breath Test, set for June 25, 2010. (CP 10). On June 2, 2010, the Court granted Mr. Moore's request to waive his presence for the motion proceeding scheduled for June 25, 2010. (CP 10).

The suppression motion was held on December 13, 2010, and the Court filed its ruling on January 20, 2011. (CP 12). On February 17, 2011, Counsel for the Defendant made an oral Motion to Dismiss for lack of speedy trial; the Court did not rule on the motion at the pretrial hearing but instead reset the matter for a hearing. (CP 12). Counsel objected on the record, noting that speedy had expired on December 1, 2010, and noting that a written motion on the issue would be filed. The Defendant filed a Motion to Dismiss for Expiration of Speedy Trial on March 29, 2011. (CP 12). The motion was heard on May 5, 2011. (CP 13). The court ruled that

the Defendant had filed an indefinite waiver of speedy trial and had failed to appear for continuance hearings that the Defendant had never been given notice of and had formally waived his presence for. (CP 13). This appeal follows.

## ARGUMENT

### **1. The trial court's failure to exercise due care in setting trial dates within speedy trial was not cured under CrRLJ 3.3(a)(4).**

Failure to set trial dates within the requirements of speedy trial is not excused under CrRLJ 3.3(a)(4). The right to speedy trial is a fundamental constitutional guarantee under both the Sixth Amendment and Article I, sec. 22 of the Washington Constitution. In 2003, the Legislature amended CrR 3.3 (CrRLJ 3.3 is analogous) and added the following provision:

“Construction. The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1 [on arraignment], the pending charge shall not be dismissed unless the defendant’s constitutional right to a speedy trial was violated.”

CrRLJ 3.3(a)(4)

The Court in *State v. George* interpreted the provision of CrRLJ 3.3(a)(4), noting that this rule “resulted from the task force’s concern that the due diligence standards imposed by this court in applying certain sections of the rule were ‘vague and of limited value in predicting how

other cases will be decided.” *State v. George*, 160 Wn.2d 727, 738, 158 P.3d 1169 (2007) (quoting WASHINGTON COURTS TIME-FOR-TRIAL TASK FORCE, FINAL REPORT 11.B at 12-13 (Oct. 2002)). The Court went on to state, however, that “the fundamental principle that the State must exercise due diligence in bringing a defendant to trial continues in force.” *Id.* at 738.

Nothing in CrRLJ 3.3(a)(4) purports to cover a case with facts similar to the one in question. In fact, the court in *State v. Wilks* had a similar issue where the Defendant filed a suppression motion and then an appeal of that suppression motion to the Court of Appeals. *State v. Wilks*, 85 Wash. App. 303, 932 P.2d 687 (2004). The trial court and prosecution erroneously believed that speedy trial would be stayed pending the suppression hearing and review by the Court of Appeals. The Court of Appeals disagreed and refused to extend speedy trial finding that it was the responsibility of the court and prosecution to bring the case to trial within speedy trial time.

The present case is directly analogous to *Wilks* in that a suppression motion was filed and during the pendency of that motion speedy trial expired. In Mr. Moore’s case, just as in *Wilks*, this court should find that speedy trial has been violated and dismiss this case.

2. **The trial court erred in ruling that the Defendant failed to appear when the Defendant had waived his presence in writing and was never sent notice to appear at any of these hearings.**

- a. *Mr. Moore was not required to be present for the hearing June 24, 2010.*

On June 2, 2010, the Defendant filed an appearance waiver and the court granted his motion to waive his presence for the motion hearing that was currently set for June 25, 2010. At the behest of Judge Meyer, a “status hearing” was called by the calendaring clerk by email notice at 4:30pm on June 22<sup>nd</sup>, 2010, less than 48 hours from the hearing time, set for on June 24, 2010. The purpose of the “status hearing” was to allow the judge to address a motion to continue. At this time this hearing was set, Mr. Moore had already filed his appearance waiver and it had been granted. The Superior Court found that Mr. Moore’s failure to appear at this June 24, 2010, “status hearing” reset the speedy trial clock.

In a case directly on point, the State in *Wilks* argued that the Defendant waived his speedy trial objection when he: “(1) did not appear in court when various motions were heard, (2) did not appear for trial on June 21 since he planned to seek discretionary review of the court’s suppression decision, and (3) did not notify the court or the prosecutor of his reliance on the speedy trial rule...” *Wilks*, 85 Wash. App. At 307. The Court ruled that, “Mr. Wilks did not waive his speedy trial right.

Though the State complains Mr. Wilks did not appear at every hearing, he was present at every proceeding at which his presence was required by CrR 3.4.” *Id.* at 309-310.

Just as the Defendant in *Wilks* was not present for various motion hearings but was present for all required hearings, in the present case, Mr. Moore was present for all hearings in which his presence was required. Mr. Moore had earlier filed a written waiver of appearance and was therefore, not required to be present for this hearing.

Additionally, even if the Defendant had not filed a waiver of presence, this hearing was called by **the judge** on less than 48 hours’ notice by email, and no notice was provided to the Defendant requiring his presence or informing him of the hearing.

The Court in *Wilks* ruled that, “The trial court is ultimately responsible for ensuring compliance with CrR 3.3, but as between the State and the criminal defendant, the State is responsible for bringing the defendant to trial within the speedy trial.” *Id.* at 309. Just as in *Wilks* where the trial court and the State were responsible for bringing the Defendant to trial, in the instant case the trial court and the State were responsible for bringing the Defendant to trial by notifying him of the hearing. They ultimately failed to bring Mr. Moore to trial within the time prescribed by law; therefore, this case must be dismissed.

***b. Violation of Procedural Due Process***

Requiring a Defendant's presence at a court hearing without providing notice of that court hearing violates the Defendant's Due Process rights. At a minimum, procedural due process under Washington Constitution, Article I, §3 and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision, the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial. *In re Messmer*, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)).

In *Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103 Wn.App. 411, 12 P.3d 1022 (2000), the Court of Appeals states this principle as follows:

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The Washington Constitution contains an almost identical clause. Wash. Const., art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law."). At minimum, procedural due process requires notice and an opportunity to be heard. *Rivett v. City of*

*Tacoma*, 123 Wn.2d 573, 583, 870 P.2d 299 (1994).

“Generally, in looking at the degree of process that will be afforded in a particular case, the court balances the following interests: (1) the private interest to be protected; (2) the risk of erroneous deprivation of that interest by the government’s procedures; and (3) the government’s interest in maintaining the procedures.” For due process protections to be implicated, there must be an individual interest asserted that is encompassed within the protection of life, liberty, or property.

*Silver Firs Town Homes, Inc.*, at 1029.

In the present case, the Defendant was deprived of procedural due process because the court failed to provide notice of any hearing after the notice for the original motion date of June 25, 2010. (CP 11-13). The Defendant was provided with notice for every hearing throughout the criminal process including pretrial and motion hearings until the original date of the motion hearing (June 25, 2010). From that point forward, the court failed to provide any notices and the Defendant was never given notice of ANY court hearing. (CP 11-13).

While the Defendant filed an appearance waiver on June 2, 2010, the Defendant’s appearance waiver does not provide for the waiver of notice of future hearings. The court granted the Defendant’s motion to waive his presence. It is unclear how the docket reflects “DEFT NOT PRESENT” when roll was not called. The Vosk uncertainty motion involved more than one hundred Defendants and defense attorneys. Many defendants and defense attorneys were present for all of these

hearings, but due to their numbers, Defendants remained in the sitting area, not at counsel table. With more than one hundred Defendants, the Court's conclusion that each client should have notified the State and placed their presence on the record at each of these (many) hearings is unreasonable and would have proved impossible and untenable.

After the date of the waiver above, no further written notices were provided by the court to the Defendant (CP 11-13). The Defendant was never advised that waiver of his personal appearance at these hearings constituted a waiver of speedy trial. In order to waive speedy trial, Thurston County District Court requires specific language that includes:

I understand that I have a right to a speedy trial which, under the Criminal Rule for Courts of Limited Jurisdiction, is a trial within sixty (60) days of the commencement date if I am being held in custody, or ninety (90) days of the commencement date if I have obtained pre-trial release from custody; and that I may waive such right to speedy trial by signing this waiver, so long as I do so knowingly, voluntarily and intelligently.

The court was not relieved of its requirement to send notices for court hearings to the Defendant based on his filing of a waiver of appearance. Therefore, the State cannot turn around and argue that the Defendant wrongfully failed to appear for these hearings thereby resetting speedy trial. The Defendant had permission of the court not to appear for these hearings.

For the court to find that the Defendant failed to appear for hearings for which he was never provided any notice, violates the Defendant's procedural due process rights. The Defendant's absence was permitted by the court and Defendant's absence under these circumstances does not reset the speedy trial rule. Therefore Defendant's speedy trial expired on December 10, 2010. Mr. Moore's case must be dismissed.

**3. The court erred in ruling that Defendants' attorneys had an ethical duty to notify their clients of court hearings under the Washington Rules of Professional Conduct.**

**a. The Defendants' attorneys had no ethical duty to notify their clients of court hearings under the Washington Rules of Professional Conduct.**

There is no authority to support the position taken by the Superior Court that the Defendants' attorneys have a duty under the Washington Rules of Professional Conduct to notify their clients of potential hearings so that these clients can attend.

Additionally, this hearing was called by the court clerk at the direction of the judge on less than 48-hours' notice to the Defendants' attorneys. This was not a normally scheduled hearing and proper notice was never provided to the Defendants' attorneys.

**b. The prosecution and the court have a duty of good faith and due diligence to attempt to provide notice and provide the Defendant with the opportunity to be present in court.**

The State must exercise due diligence in providing notice and ensuring a Defendant's presence in court. In the present case, Superior Court held that it was the responsibility of the Defendant's counsel to notify Defendant of court hearings.

I can find no authority to support such a conclusion. In fact, the Supreme court in *State v. George* held that "the fundamental principle that the State must exercise due diligence in bringing a defendant to trial continues in force." *George*, 160 Wn.2d at 738. The facts in *George* are slightly different than the instant case, but they are analogous on this point.

In *George*, the Supreme Court acknowledged the application of CrRLJ 3.3(a)(4) (same as CrR 3.3(a)(4)), which appears to limit review only for technical violations evident in the precise language of the rule. *George*, 160 Wn.2d at 738-39. The issue there was whether the time for defendant's district court trial either tolled while the defendant was in custody for a charged felony in a separate county or whether the time for trial recommenced upon defendant's failure to appear due to being held in that other county. *Id* at 734. The Court refused to limit its review to

the precise language of the rule, and held that courts must still interpret the speedy trial rules in a way that does not render its provisions “superfluous,” which sometimes requires courts to go beyond the strict language of the rule. See *Id.* at 734-735. Finally, the court held that ever since the 2003 amendments, “the fundamental principle that the State must exercise due diligence in bringing a defendant to trial continues in force.” *George*, 160 Wn. 2d at 738.

The 2003 amendments to CrRLJ 3.3 (including the limit on construction found in CrRLJ 3.3(a)(4) did predate the rulings in both *State v. Welker*<sup>1</sup> and *State v. Olmos*<sup>2</sup>. In both of these cases, the Courts went outside the strict language of CrR 3.3 and analyzed whether a duty of good faith and due diligence existed and was violated in conjunction with the rules on Interstate Agreement on Detainers (IADs). *Id.* These Courts did not end the inquiry with CrR 3.3(a)(4) (limiting speedy trial review circumstances covered by CrR 3.3). Instead, the Courts in both *Welker*, *supra*, and *Olmos*, *supra*, acknowledged a prosecutorial duty of good faith and due diligence to attempt to acquire defendants’ presence from the other jurisdiction (or at least file the IAD request) if defendants’ whereabouts were known. *Welker*, 157 Wn.2d at 565-68; *Olmos*, 129

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<sup>1</sup> *State v. Welker*, 157 Wn2d 557, 565, 141 p.3d 8 (2006).

<sup>2</sup> *State v. Olmos*, 129 Wn. App. 750, 120 P.3d 139 (2005).

Wn. App. At 758.

Similarly, in the present case, the Defendant's whereabouts were known to both the court and the State and no effort was made to attempt to secure the Defendant's presence for this hearing. No notices were sent to Defendant and no effort made. Comparable to the prosecutorial duty of good faith and due diligence to attempt to acquire defendants' presence for court in *Welker* and *Olmos*, in the present case, an analogous duty to provide notice to the Defendant and ensure his ability to be present in court in a fundamental principal and requires the same duty of good faith and due diligence.

Finally, the

### CONCLUSION

This Court should reverse the trial court's ruling because of the following: (1) the trial court erred in ruling that the failure to exercise due care in setting trial dates within speedy trial was cured under CrRLJ 3.3(a)(4); (2) the trial court erred in ruling that the Defendant failed to appear for court hearings continuing the motion hearing when the Defendant had waived his presence in writing and was never sent notice to appear at any of these hearings; and (3) the court erred in holding that it was defense counsel's responsibility to notify Defendants of court hearings and in holding that the court and prosecution are relieved of any

duty of good faith and due diligence in providing notice and providing the opportunity for Defendants to be present at court hearings.

For these reasons we ask that this court reverse the trial court's ruling and dismiss this case.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of June, 2012.

A handwritten signature in black ink, appearing to read 'CLB', written over a horizontal line.

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# HANEMANN, BATEMAN, AND JONES

**June 20, 2012 - 4:54 PM**

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